

# Review Essays

## The Laws of Rule in the Soviet Union

SOVIET LAW AND SOVIET REALITY. By Olimpiad S. Ioffe.† *Dordrecht: Martinus Nijhoff Publishers*, 1985. Pp. 1, 229. \$45.50.

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Sometimes the Soviet legal system resembles an elephant that has taken care to blind its observers. Soviet lawyers and law teachers, inhibited by training, interest, or caution, tend to turn out celebratory declamation; emigrés cherish the particular truth of their own grievances; Western correspondents hit and run; foreign jurists do justice to special injustices or produce descriptive summaries of Soviet texts that have emerged through filters of concealment, omission, exaggeration, and circumlocution. Yet the elephant is a whole animal and is on the move, and every now and then a naturalist comes along who strives to convey a notion of the shape and motion of the whole living animal.

The latest, and one of the most interesting, of these is Olimpiad Solomonovich Ioffe. For a good many years, until the late 1970's, he occupied the chair of civil law at the University of Leningrad; he had few peers in the influence and respect he commanded throughout the academic legal community in the Soviet Union. When, however, he refused to execute a document facilitating his daughter's application to emigrate, he was de facto removed from his teaching position. Later, after more than a little delay and hindrance, he himself emigrated, and at length resumed his interrupted career. He has taught or studied at Harvard, Boston University, and now, regularly, at the University of Connecticut, and he has written, among other things, articles on legal regulation of the Soviet economy<sup>1</sup> and parallels between Roman and Soviet law,<sup>2</sup> as well as a treatise on Soviet law with Professor Peter Maggs.<sup>3</sup>

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1. Ioffe, *Law and Economy in the USSR*, 95 HARV. L. REV. 1617 (1982).

2. Ioffe, *Soviet Law and Roman Law*, 62 B.U.L. REV. 701 (1982).

3. O. IOFFE & P. MAGGS, *SOVIET LAW IN THEORY AND PRACTICE* (1983).

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With his latest work<sup>4</sup> Professor Ioffe has set out a comprehensive, condensed, rebarbative, provocative map of Soviet legal and public affairs.

### I. Message

*The plan of the book.* The introductory chapter of the book lists critically six ideological dogmata<sup>5</sup> and five practical components<sup>6</sup> of the Soviet legal system. Each of the five chapters between that introduction and the conclusion is divided into two main parts, between which there is a "contradiction."<sup>7</sup> One of the two parts indicates a horizontal relationship, the other a vertical: thus, democracy/centralism, freedom/domination, emancipation/slavery, equality/hierarchy, legality/arbitrariness. Each of the two main parts in a chapter is in turn divided into law and practice, or what legal realists call law on the books versus law in action. The scheme has generated five topics, times two contradictory aspects, times two faces of legal reality, for  $5 \times 2 \times 2 =$  twenty sections.

Breaking down each of the five topics into  $2 \times 2$  gives Professor Ioffe more play in the joints of his structure than a  $1 \times 2$  format would have permitted. That is, instead of crowding everything into either nominal horizontality or actual verticality, he can assign some particulars to one of the paradoxical intermediate cells—nominal verticality and actual

4. O. IOFFE, *SOVIET LAW AND SOVIET REALITY* (1985) [hereinafter cited by page number only].

5. (i) Law is determined by the economy and cannot in its commands exceed the level of economic development, but at the same time, Soviet law plays a creative role and, actively reacting to the economic basis, promotes the latter on the progressive road of building communism. (ii) Law is not only protected, but also created and sanctioned by the state, and, since any state personifies one or another dictatorship (of the dominant class in capitalist countries or of the whole people in the USSR), so law, obligatory for everybody and everyone [sic], cannot be binding to the state itself. (iii) Law is an expression of the will of the state as its creator, and because the state, in its turn, is an organization of political dominance implemented by the ruling class in capitalist society and by the whole people in socialist society, law virtually expresses either the separate will of the dominant class or the general "all-people's" will. (iv) Law is protected by the state, relying upon its compulsory measures. However, while the law of capitalist countries—expressing the will of the ruling class—is observed by the other sections of the population by virtue of the fear of eventual or actual coercion, Soviet law—expressing the general will—is, as a rule, observed voluntarily and applies compulsion only in a very restricted number of cases, where an individual puts his own interests, which are wrongly understood, on a higher level than more important collective interests. (v) Law is an institution whose purpose is to protect and strengthen a certain social order and certain social relationships on the condition that they are advantageous and convenient for the ruling class in capitalist countries and for the whole people in the USSR. (vi) Law is an historically transient phenomenon; it appeared together with private ownership and the class division of human society; it changed its nature when the law of the exploiting society was replaced by socialist law; it plays an important role in the building of socialism and communism; it will wither away together with the state as soon as communism gains victory all over the world. Pp. 6-10.

6. (1) Unlimited political power of the ruling summit; (2) the economy; (3) the entire complex of governing bodies; (4) the Soviet people; (5) Soviet law. Pp. 11-13.

7. P. 5.

horizontality. In the political chapter, for instance, if he had confined his outline to "political freedom in Soviet law; political domination in Soviet practice," he could not have made distinctions quite as nice as those that he can fit by means of the intermediate categories of "political domination in Soviet law" and "political freedom in Soviet practice." Differentiation is a net gain, even though here and there (as in Chapter V, the rule-of-law chapter)<sup>8</sup> the intermediate cells seem a little thinly populated.

*Coverage.* While the examples with which the book is studded range widely over Soviet life, it is not extraordinary to find that they draw more on academic and urban than on laic or rural experience; that their location is more often Leningrad than elsewhere; and that they do not pretend to constitute a comprehensive picture of Soviet law, government, or society. Relatively little, for instance, appears on the unskilled workers, whether in factories or on the farms.<sup>9</sup> The author's dyadic inclination tends to move all his images of social and political actors toward the extremes of every relevant continuum: top or bottom, "We" or "They," rulers or ruled, oppressors or oppressed. He does report instances of horizontal conflict at or near the top, but one should not expect him to have placed officials and scholars at finely calibrated intervals according to degrees of compliance/conformity/accommodation/cynicism/resistance, or degrees of honesty/compromise/fiddling/corruption/theft.

Temporally, also, the illustrations seem to be clustered more thickly in the 1960's than in the '50's or '70's. As Professor Ioffe worked and observed in the Soviet Union throughout all three decades, one is tempted to conclude that—thanks in part to Nikita S. Khrushchev—the early sixties were years in which, whether or not more was happening than at other times, at least more transpired. Perhaps more was going on in Soviet law then, or perhaps it was then that Professor Ioffe enjoyed his best access to otherwise privileged information.

The chronological unevenness of the illustrations does not, however, diminish their timeliness. Many of the habits of thought, turns of speech, abuses of law, and sneers of cold command are robust enough to have survived twenty-five years and four successions of leadership; though the current leader is displaying and thus encouraging a new and more open style, no one can tell yet whether it will last and whether it will be translated into other substantive changes.

*Editorial.* The large number of internal cross-references, especially to examples, suggests some weakness in the structure of the book. It may

8. P. 181.

9. For a contrasting approach, see *THE SOVIET WORKER* (Schapiro & Godson eds. 1981).

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be only the excessive overlap that has to be expected when the chapters are based on abstract concepts of which two or more are often exemplified in the same concrete episode.

From the standpoint of formal mechanics, the book is assembled much better than was the Ioffe-Maggs book,<sup>10</sup> which perhaps should rather be called (after Charles Lamb) a thing in book's clothing. Here and there something is repeated without explanation,<sup>11</sup> or the density of the diction takes away more in intelligibility than it contributes in economy,<sup>12</sup> or the translation<sup>13</sup> or transliteration<sup>14</sup> or the English<sup>15</sup> seems unnecessarily idiosyncratic.

Soviet ideology stamps its dynamics on Soviet rhetoric—and vice versa. Even Soviet citizens who reject the ideology reveal the imprint of the rhetoric. Professor Ioffe's prose, influenced doubtless by the inveterate Marxist-Leninist-Stalinist pattern that emphasizes contraries and dyadic pairs, is no less binary than his outline. Take the following Escher-like construction of interwoven contrapuntal multilevel opposites:

Thus, the Soviet system represents democratic centralism and centralized democracy. At the same time, democratic centralism, real or only proclaimed, cannot function without political freedom, actual or only imaginary. Similarly, centralized democracy, unrestricted or even mitigated,

10. To be sure, that alone would not be high praise. See Zile, *Embarrassing in Form, Promising in Substance: Reflections on Ioffe & Maggs' Soviet Law in Theory and Practice*, 1985 Wis. L. Rev. 349, 350-51.

11. For example, in one place (p.2) the author criticizes another scholar for saying that "we should not allow the violence and injustice which have accompanied the birth and growth of this conception [of man, as a basis for Soviet law] to obscure its underlying significance." He observes that that statement

is almost entirely devoid of any attention to the shortcomings of Soviet law and actually supports the view that here we simply have one of several legal systems in human history and in the contemporary world with defects and merits, which embody great services to the whole of humanity and should not be disregarded despite the dark sides of the same system.

One and a half pages and 16 footnotes farther along, the author notes a euphemism "in the words 'the violence and injustice which have accompanied the birth and growth' of the Soviet conception of law . . . as if now, when this concept has attained its maturity, no 'violence' and 'injustice' accompany it anymore." P. 4 n.28. Both criticisms may be just; but at the second reference the reader is given no clue that there ever was a first reference.

12. After quoting the Fundamentals of Civil Legislation on "full use . . . of the goods-money relationship" and regulation of "the property relations resulting from the employment of the goods-money form of economy in the construction of communism," the author adds: "Nevertheless, in case of necessity, Soviet practice allows the withdrawal of property from economic organizations despite the legal command to use the goods-money form." P. 14.

13. E.g., why translate *anarcho-syndicalism* as "anarchic syndicalism," p. 51, when the term as it stands is well known and the translation offered means something else?

14. E.g., *rabochiata oppositsiia*, p. 51, has an extra *i* after the *ch* and an *s* instead of (for translation in an English text) *z* after *oppo*.

15. E.g., "shall" often is confusingly used like the German *soll*. See also p. 173 ("[A]n attempt to strengthen that what had officially been settled . . ."); p. 133 n.35 ("[T]hey are of such unequal a strength that . . .").

cannot operate without political domination, unlimited or even restrained. Therefore, the USSR allows political freedom and establishes political domination to the same extent as it personifies democratic centralism and centralized democracy. Each is reflected in Soviet law and embodied in Soviet life. The suggested analysis must reveal whether this embodiment is commensurate or disproportionate. One thing, however, seems clear in advance. The very fact of the interdependence between democratic centralism and centralized democracy, on the one hand, predetermines the adequacy of their reproduction in everyday practice and legal regulation in the Soviet state.<sup>16</sup>

Here the one thing that seems "clear in advance" is the sentence that says so. The reader will take some comfort, but not much, from the knowledge that the paragraph bridges the transition from the chapter on the law of democratic centralism and centralized democracy to the chapter on the law of political freedom and political domination. More important, after having read that far the reader will be glad to pay the price of clotted dyads in return for the information, trenchancy, and good sense that they convey.

## II. Ladder

*Kto kogo.* What emerges prominently from the contrasts the author draws is the regime's, and consequently his own, preoccupation with the old Leninist theme of *kto kogo*, who-whom (who will defeat/oust/liquidate/dominate/conquer/ [unprintable] . . . whom). This is made clear in an introductory passage, pointing out that

a . . . highly important function of law [is] unconditional subordination of the Soviet people to Soviet power, subordination in all imaginable areas—in public and private life, in economic, political and intellectual activity, in attitudes toward governmental and public agencies, and toward the Soviet state as a single unit.<sup>17</sup>

16. P. 49. For a shorter specimen, see p. 54, where, after noting that "as Marx was wont to say in characterizing capitalist law, Soviet law declares political freedom in general rules and abolishes it in numerous reservations," the author adds:

These reservations abolish political freedom not only in the aspect of contrasting capitalism to socialism, but also within the limits of socialism itself when a confirmed orthodoxy collides with a disapproved heresy or when a practical line adopted at a given period is contradicted by the suggestion of another practical approach.

Similarly, on pp. 115-16, the author has constructed two paragraphs, one of fourteen lines and the other of thirteen, which conform to the same template with a regularity no less hypnotic than Stalin's prose in *Fundamentals of Leninism*. See Lipson, *Stalin's Style*, 70 YALE REV. 500 (1981).

17. P. 13.

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Accordingly, the “vertical” halves of each of the book’s substantive chapters tend to weigh more than the “horizontal” halves.<sup>18</sup>

As a partial offset, Professor Ioffe notes the continual alternation of moves toward centralization and decentralization. Those themes recur in many corners of Soviet law and government; in a country of 270 million inhabitants, stretching over a sixth of the land surface of the earth, one would not expect otherwise. Professor Ioffe devotes some attention to centralization/decentralization throughout the book, but gives it particular treatment in his chapter on the economy, the legal side of which has been his special study. In the cyclical efforts of the Soviet authorities to come to grips with the contradictions between the rulers’ ideology and the people’s needs, he points out, the vector of centralization has been carried mainly by the institution of the Plan; the vector of decentralization, by the institution of economic accountability (*khozraschët*, the notion that the enterprise should be treated as relatively autonomous at least for some purposes of accounting and evaluation). Centralization, generally preferable from the standpoint of the political leadership, usually wins.<sup>19</sup>

*Government by the people.* Among other comments that might be offered to eke out Professor Ioffe’s laconic exposition of the relationship between the rulers and the ruled is one that pertains to the Soviet institution of the referendum. He quotes the Constitution of 1977 to the effect that

“the most important questions of state life shall be submitted for discussion by the whole people and also to a vote by the whole people (referendum).” Such an exceptional expression of the people’s will is reduced to a purely consultative function in the first case . . . but it could acquire a decisive role in the second case (referendum). Therefore, since 1936, when the possibility was first introduced by Soviet law, referendums have never been applied in practice.<sup>20</sup>

This treatment of the referendum omits, no doubt by design, any mention of a thesis once advanced by another Soviet scholar,<sup>21</sup> who claimed that more referenda had been held in the Soviet Union since the 1917 revolution than had taken place in the entire history of any other country in the world (including Switzerland, which had previously been supposed to hold the record). He supported that contention by redefining the term:

18. See *supra* note 7 and accompanying text.

19. Pp. 125-26.

20. P. 50.

21. The late Viktor Fomich Kotok, a senior research fellow at the Institute of State and Law of the Academy of Sciences.

for him, the Soviet Union had pioneered a "referendum of a new type,"<sup>22</sup> which encompassed not only what we might call the imperative referendum, but also the advisory or consultative referendum, the initiative, and, above all, broad public discussion of pending legislative proposals. Of course, he denied that he was redefining the term: he rested his case on the authority of Lenin, who he said had spoken of referenda in just that broader sense. At a meeting<sup>23</sup> where his manuscript was discussed as work in progress, he stated that for him those words of Lenin were Holy Writ (*sviatynia*). Some scholars attacked his thesis, both on the interpretation of Lenin's usage and on the other merits,<sup>24</sup> but others supported him, and—more important—the senior officials of his institute affected to hear the criticisms as provisional approval.

The vexed question, which Professor Ioffe quite rightly vexes still more, of the relationship of the Soviet people to Soviet power is touched upon again in the section on "[t]he structure of political power"<sup>25</sup>: "Within the limits of Soviet law all power in the country belongs to the people, who, however, in principle exercise it indirectly, through soviets of people's deputies generally elected."<sup>26</sup> The author immediately observes that that legal declaration is disproved in Soviet practice; but his tongue-in-cheek recitation of the dogma may recall to some readers a story in the genre that attributes to Radio Erevan in Soviet Armenia (apocryphally) a program in which questions submitted by the public are relayed to experts, whose answers are read out on the air: "Q. Is it really

22. This was indeed the title he proposed for the book he was preparing. The very wording is a political statement, for it was long a standard cliché for praise of any Soviet institution or phenomenon (X, say) to proclaim it "an X of a new type." Viktor Fomich was saying not only that what he called a "referendum" was good, and unique, but also that it was good and unique in the same way that other Soviet innovations were good and unique and that he was aligning himself with tradition in using that form of praise.

23. Observed by the writer of this Review Essay.

24. One of the critical observations, made by a younger and brighter colleague, went approximately as follows (paraphrase by the author):

Viktor Fomich means to pay a compliment to Soviet reality by asserting that what we have is a referendum of a new type. But is that such a compliment? One would not call a motor car a cart of a new type; one would not call a palace a hut of a new type. It may well be that the Soviet Union has something quite new and far better than the traditional institution of a referendum; but in that case let us call it by its right name. What Viktor Fomich is really talking about is the comprehensive expansion of the participation of the people in all the phases of law-making activity. His title ought to be changed to reflect that subject-matter.

Once that is done, then the contents of his manuscript ought to be revised to correspond to the new title . . . .

25. P. 59.

26. Pp. 59, 114.

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true that the Soviet people eat caviar? A. Certainly, through their elected representatives.”<sup>27</sup>

*Counter-nonsense.* From time to time the author meets Soviet official nonsense with straight-faced counter-nonsense. Near the start of each “substantive” chapter, especially in the first of the  $2 \times 2$  sections, he juxtaposes three or four pronouncements from the Constitution, the Fundamentals, or a Code, and solemnly demonstrates that their interrelationships are such that no serious thinker can think them serious. In his third chapter, he performs this operation at length on the relationship between the basis of the economic system and the forms of socialist ownership.<sup>28</sup> A briefer example has to do with the right to strike. The Soviet Constitution does not mention a right to strike among the many rights it enumerates. The official explanation is that “because the country’s economy belongs to the working masses, they have no need of the right to strike, since they cannot strike against themselves.”<sup>29</sup> Professor Ioffe comments:

This explanation . . . is vulnerable logically as well as practically. Logically it is vulnerable in two regards. On the one hand, if strikes are really impossible in the USSR, the Soviets could recognize the right to strike without any danger or fear. . . . On the other hand, an official concept of Soviet leadership says that the country’s economy belongs to the people in the person of the state, not to the collective bodies of separate enterprises. This means that strikes at one or another enterprise are quite possible, being directed against the state, not against strikers themselves.<sup>30</sup>

These aspects of Soviet governance—*kto kogo*, the referendum, forms of socialist ownership, right to strike—indicate in different ways how pervasively Soviet citizens are preoccupied with the problem of the ladder: who is on it and who is off, who stands on what rung, who is moving to a higher rung and who to a lower. The answers to these questions go far to determine standard of living (housing and location of work, vacations, foreign travel, imported goods, quality of medical care and other services, caviar . . .), access to education for the next generation and to the privilege and income that education facilitates, and intangible benefits in that most highly classified of classless societies.

27. Cf. “Q. Is it possible to construct socialism in a small country like Switzerland or Denmark? A. Yes, it is possible, but it would be a pity.”

28. Pp. 93-110.

29. P. 53.

30. *Id.*



## III. Sham

*Accountability and Hypocrisy.* In those chapter-parts devoted to "law" as contrasted with "practice," Professor Ioffe, who before his troubles was a senior and even a dominating scholar at Leningrad University in the field of civil law, ranges over the texts with a familiarity that has bred contempt. An example is his consideration of accountability, which has been declared to be an element of Soviet democratic centralism.<sup>31</sup> The Constitution makes all organs of state power accountable to the people, yet the only such organ that reports to the electors is the deputy, elected to a soviet, and even a deputy cannot be recalled until the voters have been assembled in a recall meeting, convened by the appropriate governmental agency (which in turn, of course, is subject to instruction from the appropriate Party authorities). The book contains several similarly pithy analyses of particular "contradictions" among texts, even aside from the evidence of practice.

If hypocrisy retains its epigrammatic definition as the homage that vice pays to virtue, Soviet law abounds in examples. Professor Ioffe mentions the polling booths, an institution known and understood throughout the world as a simple and effective means of preserving the secrecy of the ballot. In the Soviet Union, however, Professor Ioffe points out, polling booths "are set up in such a way, that anybody attempting to use them makes himself conspicuous and, as a consequence, evokes suspicion, because one has no need to make use of the polling booth if one votes in favor, and not against, the single candidate."<sup>32</sup> In other words, the Soviet system makes polling booths available because they are a well-known device of democratic government; but in order to avoid adverse results and to intimidate the voters (whose votes they insistently demand), the regime does not require that every person who votes use the booths, but only makes them available to those who wish to go into them. Those who vote *for*, do so in public; those who vote in "secret" are suspected by the poll-watchers of voting *against*.

Take, again, the celebrated "meeting," shown on television not long before the end of the period of Brezhnev's chairmanship, of the Presidium of the Supreme Soviet. Tikhonov, the chairman of the Council of Ministers, read a report for twenty minutes; Brezhnev read from his notes for twenty minutes, quoting from Tikhonov's speech; the several dozen participants declined Brezhnev's invitation to ask questions or make suggestions and wordlessly voted in favor of the draft decision put

31. Pp. 22-24.

32. P. 26.

before them. With that, a performance that must have been intended at its conception to demonstrate the vitality of the deliberations of the governmental summit ended by exhibiting the hollowness of the pageant.<sup>33</sup>

*Evenhandedness.* Frequently the hypocrisy of the Soviet regime takes the form of “evenhandedness”: giving with one hand in public, taking away with the other in public or in private. Professor Ioffe gives several examples of this in connection with the citizens’ right, declared in the Constitution, to unite in social organizations. When students requested that the sporting society *Nauka* (Science) be divided into two separate societies, one for students and the other for professors, the request was refused as non-expedient, no doubt in compliance with a secret instruction, “and no other explanation could be demanded.”<sup>34</sup> When Roy Medvedev, a dissident historian of the Soviet period, was nominated by adherents to be a candidate for deputy of the Supreme Soviet, “the competent powers refused to register him, because the right to nominate candidates for deputies of all the soviets belong [sic] to social organizations, and the group [that] . . . nominated him could not be considered an organization of this kind.”<sup>35</sup> The independent formation of groups to monitor compliance with the Final Act of the Helsinki Conference could not be held contradictory to the aims of communist construction, because the Soviet Union had signed the Final Act, “but their inexpediency did not need any elucidation and their illegality resulted from the very absence of the necessary permission.”<sup>36</sup> Again, citizens have a constitutional right to submit proposals to state agencies concerning the improvement of the agencies’ activities and to criticize shortcomings in work; “[n]evertheless, up till now not one case has been heard where a citizen’s proposal has led to positive governmental decisions, while cases of criminal or administrative prosecution for criticism of shortcomings in work have occurred in great number.”<sup>37</sup>

33. Pp. 28-29. On its early form, the Gorbachev regime has improved its presentation in this area: *public* relations among members of the leadership are less wooden, though perhaps no more spontaneous, and press conferences are less stilted.

34. Pp. 56-57.

35. P. 57.

36. *Id.*

37. P. 61. This statement should not be taken to mean that the Soviet Union pays no attention to citizens’ complaints. Soviet citizens often complain actively to many in positions of authority or quasi-authority: through Party channels, to deputies, to local officials at work or at home, to courts, to the police, to the procuracy, and, especially, to the press. No doubt many complaints are aborted by intimidation, and many are ignored or dismissed, but the authorities often acknowledge and even adopt complaints from a variety of motives, which can include the desire to satisfy some part of the public.

Evenhandedness of the same sort is to be found in the recent issuance of internal passports to the peasants (collective farmers).<sup>38</sup> Before receiving passports they were tied to the land, because residence in the cities without a passport was, broadly speaking, illegal. Now that they have passports, they are still tied to the land, because "certain peculiarities of passport numbers, known to the . . . Ministry of Internal Affairs, serve as a signal to refuse an owner of such a passport registration for residence until permission from his collective farm is granted."<sup>39</sup>

In yet another example, when the Soviet Union adhered to the Universal Copyright Convention, limits previously imposed on royalties collectible by authors had to be lifted, but they were reimposed in the form of taxes increased to yield the same result.<sup>40</sup>

When evenhandedness of this sort is practiced by the holders of a monopoly of power, it sometimes takes on the characteristics of a double bind or a catch-22. Thus, the manuscript of an economist's article making a recommendation on the organization of the supply of agricultural machinery was rejected by the editors of the journal to which it was submitted because, being inconsistent with established policy, it was unsuitable for publication. A little later the regime reorganized the supply in just the way the author of the manuscript had recommended. He re-submitted. Now it was rejected on the ground that it had been rendered obsolete, for primacy of authorship obviously belonged to the political summit.<sup>41</sup>

*Analogiia.* Some of the author's interpretations of Soviet legal activity seem contestable; at least other interpretations could be suggested. For example, in dealing with the relationship between the two articles of the Russian Socialist Federated Soviet Republic Criminal Code that deal with seditious utterances (Articles 70 and 190-1),<sup>42</sup> he recalls the celebrated trial of the writers Siniavsky and Daniel in the 1960's. They were tried under Article 70, there being no Article 190-1 at the time. He points out that, as the prosecution had failed to show the defendants had acted (that is, published their books abroad under pseudonyms) "for the purpose of subverting or weakening the Soviet power," they ought to have been acquitted. Of course they were convicted. Later, Article

38. P. 67.

39. *Id.*

40. P. 73.

41. Pp. 172-73.

42. Pp. 74-75.

190-1 was enacted, providing a lesser punishment for “the systematic circulation in an oral form of fabrications known to be false which defame the Soviet state and social system . . . .”<sup>43</sup>

Professor Ioffe accounts for the new law by saying, with his usual ironic gravity, “Soviet criminal legislation could not remain indifferent toward so obvious a vulnerability of some of its rules.”<sup>44</sup> Maybe, however, the story fits a slightly different pattern. In two and perhaps three instances known to us, the Soviet authorities prosecuted and (it hardly needs saying) convicted a defendant for a “heavy” crime of which any fair-minded observer would have said the defendant was innocent, in the absence of an apter, “lighter” statute. The Siniavsky-Daniel trial was one.

A second was the trial of several Soviet citizens, Jews and others, who had attempted in vain to gain access to an aircraft with a view to forcing a flight from the Soviet Union to Sweden. There being in mid-1970 no statute specifically punishing skyjacking,<sup>45</sup> the defendants were convicted of a number of other crimes, some of them very “heavy”—in fact, capital. Prosecution and punishment were again far out of line with the supposed offense. Not long afterward, a statute was passed to cover skyjacking specifically.

The possible third instance (and there may be more) involves the charge of espionage on which Anatoly Shcharansky was convicted in 1978. As Professor Ioffe says,<sup>46</sup> it does seem that the accusation of espionage was groundless; on the other hand, the fact that part of the trial was closed makes it impossible to tell what evidence was actually presented.<sup>47</sup> It seems possible, however, that the prosecution claimed that Shcharansky had assembled and conveyed to a foreigner information that, if considered piece by piece, would have to be acknowledged open and unclassified, but if taken as a whole could be thought (though not admitted) to damage the prestige of the Soviet Union in certain ways. Outrageous to make that the foundation of a conviction for espionage; but what was to be done? Until 1984, the Soviet Union did not have a law

43. P. 75.

44. *Id.*

45. This was the explanation given to Telford Taylor and the present writer by the Procurator General of the USSR, Roman Rudenko, in an interview in Moscow in 1974; see T. TAYLOR, *COURTS OF TERROR* 45 (1976).

46. P. 87. Perhaps we shall learn more from Mr. Shcharansky now that he has been released.

47. P. 206.

that made it a crime to pass information comprising unofficial official secrets to foreign organizations.<sup>48</sup>

In all these cases—the sedition and skyjacking certainly, the espionage probably—the Soviet authorities were faced with actions that they were determined to punish but that the existing statutory language did not specifically cover. (Whether it would have been wise or humane to convict the defendants even under the “lighter” enactments is a different matter.) Rather than acquit or dismiss, the authorities prosecuted and convicted under the inapplicable law, with “heavy” punishment; then, prospectively, they filled the gap in the lawbooks.

What makes these maneuvers more than usually interesting is that they put into perspective an ostensible reform accomplished at the end of the Stalin era in Soviet criminal law. Until the early 1950's, an article in the Criminal Code provided that, in the case of a socially dangerous act for which no punishment was provided in the Code, the court should apply the punishment that the Code did provide for whatever act was most closely analogous (*skhodny*) to what the defendant had done.<sup>49</sup> This provision, known as analogy of statute, fell into disuse some time in the early 1950's and was omitted from the Fundamentals and Codes promulgated in the late fifties and early sixties. We can now see, as some of us predicted, that the abolition of analogy of statute need not greatly inconvenience the Soviet procuracy or security authorities. As Professor Ioffe remarks in another, unconnected passage, broad interpretation can do the work that previously had been performed by analogy of statute.<sup>50</sup>

*Lost illusions.* Only seldom does Professor Ioffe's treatment of the mendacity and hypocrisy of Soviet law accommodate a reference to the tragic corruption of the ideals that animated some of the socialist critics of nineteenth-century Europe and appealed for so long to so many. He gives one excellent example in contrasting Soviet marriage, as ostensibly presupposed in the Code of Family Law, with Soviet marriage under the actual conditions of urban housing shortages. The Code states that Soviet legislation on marriage and the family “is called upon to actively promote the final clearing of family relations from material calculations . . . and to create a communist family in which the deepest personal feelings of people find their complete satisfaction.”<sup>51</sup> Life, however, makes a fool of the Code, for many Soviet citizens marry for convenience

48. See p. 211 for a mention which, however, is not linked by the author to the Shchharansky case or the general problem of analogy of statute.

49. Criminal Code, art. 16, 1926 (Russ. Soc. Fed. Sov. Repub.); See H. BERMAN, SOVIET CRIMINAL LAW & PROCEDURE 26, 43-44 (1966).

50. Pp. 204-05.

51. P. 67.

in order to obtain the right of permanent residence at the place where their spouse resides. When both spouses are aware of what they are doing, the formal marriage is often followed by a formal divorce when they have “exhausted all legal advantages of their marriage of convenience,”<sup>52</sup> but sometimes the spouse with the desirable residence is not aware that she—for usually it is a she—has been selected for that particular quality, and the corruption is crowned by tragedy.

Or take the corruption of the ideal of judicial independence. In his section on “legalized arbitrariness in Soviet practice,”<sup>53</sup> Professor Ioffe includes a subsection which notes that the demands of unlimited political power exceed the demands of limiting legal regulations. There he quotes a comment made by the chief of the administrative department of the Leningrad committee of the Communist Party, speaking to Leningrad judges at a closed meeting: “Yes, you judges, [sic] are independent and subordinate only to law. But you are dependent on me, are you not?”<sup>54</sup>

*Sincerity.* Foreign observers who see enough of Soviet law in practice to note the gap between law on the books and law in action sometimes slip into the marsh<sup>55</sup> inhabited by not a few political analysts and wonder “Whether They Are Sincere.” Professor Ioffe copes with that pseudo-problem by saying:

Although the practical tasks of Soviet law pertain to reality, one should not think that Soviet legislation reflects them adequately or truthfully. . . . the USSR legislature displays a duplicity in its activity, needing simultaneously to observe official dogmata and to pursue practical goals. As a result the legal texts that touch upon practical tasks of Soviet law combine truth, non-truth and concealed truth.<sup>56</sup>

It may be doubted whether any treatise on Soviet law has shown more conclusively that sham and deceit can coexist durably with laws that are meant to work and do work. The legal system is not vacuous, but it is part of a larger interacting system that includes official illegality, Party protection, secret instructions, perquisites and pull, economic monopoly, official coercion, administrative discretion, and freedom from substantive due process.

52. *Id.*

53. P. 209.

54. P. 220.

55. In a famous passage in his early pamphlet *What Is To Be Done?*, Lenin jeered at adversaries as waverers without a firm grasp on principle, sinking into a marsh. V.I. LENIN, *WHAT IS TO BE DONE?* 15 (1929).

56. P. 10.

*Legal lies.* Professor Ioffe alludes over and over, with an indignation that is partly civic and partly professional, to the existence and overriding force of secret instructions, which set at naught the formal rules. By its very nature this fact is more often suspected than proved, but it may be true still more often than suspected. One example is the secret instruction of the Ministry of Internal Affairs that forbids adoption (in all circumstances? in most? the author does not go into detail) by Jews and members of certain other nationalities; that instruction overrides the official regulations that permit adoption.<sup>57</sup> Similarly, higher education is riddled with secret instructions, ranging from criteria for admission to criteria for placement.<sup>58</sup> Officials, who must be considered a privileged caste whether or not they can be called the ruling class, are by secret instructions given exclusive access to certain goods and services.<sup>59</sup> Not all public laws are trivial, and not all secret laws or regulations are important, but in general the more public, the less important.

#### IV. Pot-sherds

More than one foreign scholar working on Soviet law has likened the research activity to the work of an archaeologist, hunting for significant fragments that can be pieced together to suggest the contours of a remote, recondite civilization. Professor Ioffe, writing as if from the inside, sometimes resembles the native working with the same evidence that a future archaeologist will deploy.

*Slips of the pen.* Professor Ioffe's understandable unfamiliarity with some of the English-language sources deprives the book of useful references. For example, in the section on political domination in Soviet practice, he says, "If judicial sentences in political cases were not predetermined from the top, in the 1960's the Soviet legal journal *Sotsialisticheskaja Zakonnost* (Socialist Legality) could not have committed such an oversight as the publication of a sentence that was to be handed down by a court on the following day."<sup>60</sup> He cites no authority, but an instructive brief account of the case to which he must be referring can be found in Vladimirov's book, *The Russians*.<sup>61</sup>

In a campaign designed to put pressure on West Germany to extend the period within which war criminals might be prosecuted, the Soviet authorities gave heavy publicity to the trial of three (alleged) Estonian

57. P. 29.

58. Pp. 141-42.

59. P. 121.

60. P. 80.

61. L. VLADIMIROV, *THE RUSSIANS* 89-90 (1968).

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Nazis; one was in custody in the Soviet Union, while two were abroad and were to be tried in absentia. A reporter for *Socialist Legality*, having gotten the official facts from the prosecutor who was to try the case, wrote up the story of the trial in advance so as to meet a publishing schedule; the trial was supposed to be held after the manuscript went to press but before the time of actual distribution of the journal. An extraneous event forced a delay in the trial; no one at the prosecutor's office in Estonia notified the office of the journal in Moscow, and no one on the staff of the journal checked at the last minute with the prosecutors. Thanks to this slip in coordination, some spectators entered the courtroom with published, accurate, preterite accounts of the trial that had not yet begun. The affair was unpleasant for reporter and editor but of course had no discernible effect on the predetermined convictions.<sup>62</sup>

*Letters of credit.* In a discussion of symbolic power, Professor Ioffe refers to the importance placed on the sequence in which the names or portraits of high officials of the Soviet party or government are listed or displayed, especially during the periods of collective leadership or acute maneuvering for power at the summit. He notes:

[I]n Leningrad already in the summer of 1957, something funny happened to the Russian alphabet at an exhibition of the leaders' portraits. Suddenly 'kh' (Khrushchev) left the first place and moved to the last one, but a little later 'kh' returned to the first place, while some other letters, 'm' (Malenkov, Molotov) and 'k' (Kaganovich) disappeared completely. These alphabetical manipulations were a surprise to everyone in Leningrad, except to those people who knew that in Moscow the Politbureau had had a meeting where the fight for power continued during a day and a night.<sup>63</sup>

Shortly before that, as Professor Ioffe would have had no occasion to know, newspapers in Western Europe and the United States carried articles analyzing the order of names signed to an obituary notice that had appeared in *Pravda* or *Izvestia*. European analysts of Soviet affairs had observed that the notice, expressing condolence at the death of a general of the Ministry of Internal Affairs who had been in charge of large construction projects, bore the signatures not of all fifteen members of the Politbureau (then briefly known as the Presidium), but of only five of

62. For a parallel from the time of Nicholas I in the middle of the nineteenth century, see A. FITZLYON, *THE PRICE OF GENIUS: A LIFE OF PAULINE VIARDOT* (1964), the biography of Pauline Viardot, the singer who was the innamorata of Turgenev. A reporter in St. Petersburg got into trouble for recounting in his paper her operatic triumph in a performance that had not taken place; he had attended a rehearsal, assumed that the performance would follow in due course, and been caught when something went amiss. *Id.* at 149.

63. Pp. 77-78.



them. It might be argued, said the analysts, that the five had had personally or organizationally close connection with the decedent; if so, then the ten whose names were omitted were not necessarily being purposely slighted. Yet even the five names were not listed in alphabetical order, as would have been required under the rule that had been established by practice during the period of collective leadership. There again, it might be argued, the first two persons listed—Bulganin and Khrushchev—might have deserved their priority on the objective ground of their positions at the head of, respectively, the government and the Party. Yet even the last three of the five had been listed not in proper alphabetical order as Kaganovich/Malenkov/Pervukhin, but as Malenkov/Pervukhin/Kaganovich. Now that, they concluded, showed that the policies espoused by Malenkov were on the rise and the policies with which Kaganovich had been associated were in disfavor.

An American lawyer<sup>64</sup> sent the newspaper cutting down to experts in Washington whom the taxpayers paid to think about such clues, suggesting that the European analysts deserved high marks for spotting a significant datum and should be encouraged to persevere in their analysis, which ultimately would disclose to them that not merely the last three but all five names were listed in strict alphabetical order: Bulganin/Khrushchev/Malenkov/Pervukhin/Kaganovich followed the *Hebrew* alphabet. This implied that the recording secretary of the Presidium of the Central Committee of the Communist Party of the Union of Soviet Socialist Republics was a Zionist spy: an item of hard intelligence and problematic significance. A note came back with an intimation that it was unseemly to jest about things sacred.

*Awkward truth.* The compression evident everywhere in the book restricts Professor Ioffe to the tersest possible description of an episode that took place at a conference held in Leningrad in 1963. As he says, the conference was attended by a large number of Soviet scholars and legal workers in the field of criminal law and crime prevention; a few Eastern Europeans and one American were also present.<sup>65</sup> The main substantive speech at the opening plenary session was delivered by a well-known professor of criminal law from Leningrad University, who maintained that the scholar owed to practical workers a duty to give the facts straight, to say “No” when the right answer is “No” even though the desired answer

64. The writer of this Review Essay.

65. P. 171. The writer of this Review Essay was the American lawyer who, according to indignant Soviet participants, had “used the platform of the conference to criticize Soviet criminal theory under Stalin, [a critique that] . . . was not met with an adequate rebuttal from the side of the Soviet scholars.” *Id.*

might be “Yes.” (In short, the Leningrad professor of criminal law was telling a group of Soviet scholars and officials that the scholar had a duty to speak Truth to Power.)

For example, he began, suppose that authoritative leaders in the Soviet government were to ask the splendid scientists in charge of the Soviet space program whether a spacecraft could transport them to Mars next week. The space scientists would certainly have to reply, “The task is in principle feasible, eventually, but between now and then many serious technical problems will have to be solved, and that will take time and money. So in the terms in which the question was put to us the answer must be ‘No.’”

But what happened in law? Leaders in the government, rightly incensed by the practice by which collective farmers fed bread to cattle, had asked the jurists to draw up a law that would make that a crime. Instead of pointing out the truth that such a law would not put a stop to the practice, the jurists had dutifully drawn up the legislation; the law was enacted; and the collective farmers kept feeding bread to cattle.<sup>66</sup>

With so many scholars and practical workers meeting at this conference, he continued, the scholars must be urged to face facts and describe them accurately. But what did we see instead? Here the speaker quoted from three monographs or articles written by three junior legal scholars, whom he named and who, he said, all had a bright future. The passages he quoted, closely similar to one another, declared that the overwhelming majority of Soviet workers in the field of food provisioning and retail distribution were conscientious and honest and would never commit violations of the criminal law by theft or graft; that a numerically insignificant, but morally obnoxious, minority did commit such crimes, to the disgust and indignation of the honest majority.

Then he contrasted such statements with documentation of a different genre, quoting from the record of a well-known recent mass trial of grafters, bribe-takers, embezzlers, and thieves in those very industries.<sup>67</sup> One

66. The passage about feeding bread to cattle, though not mentioned in Professor Ioffe's book, may have been one of the particulars contributing to the observation in another part of the book that “the Soviet rulers, unable to overcome numerous economic and other predicaments, nevertheless resort to taking legislative measures, which have a calming or encouraging effect—as if legal commands could improve something by themselves, without the necessary economic or other substantive prerequisites.” P. 195. This is one of the few places where the author alludes even indirectly to the discrepancy between Marxist tenets and the operations of Soviet statecraft: the partial truth of economic determinism has given way to the illusion that the decrees of a powerful government will magically reverse undesired economic activity.

67. The trials from which the speaker quoted were probably among those mentioned in a different connection on p. 143. They had led to the conviction of a large number of officials on charges of bribery and graft and had affected the political careers of some highly placed Party leaders with whom the defendants were connected.

witness/defendant after another had testified, in effect, "Of course I took [or, of course I gave] bribes [or kickbacks, or rake-offs]. How else do you think the business got done? I wouldn't have lasted two weeks if I hadn't gone along."

The speaker's last illustration was less colorful but even more significant and, one gathered, even more distasteful to the highly placed legal and Party authorities who made up part of the audience. He mentioned two books recently published in the Soviet Union, one written by himself and one by another Soviet legal scholar. "The authors of these books work far apart, do not know each other well, and do not keep in touch with each other; their work is devoted to different themes, and they have different points of view. Yet sentences, paragraphs, even whole pages in the two books are virtually identical. Now, the question is—lacking a common workplace, a common theme, a common viewpoint, and personal communication, what is it that these books have in common? And the answer is—an editor."<sup>68</sup>

The unfortunate speaker<sup>69</sup> is now beyond the reach of official vindictiveness. Surviving colleagues, however, surely remember the lessons of his lecture as well as the lessons of the persecution that followed it.

Is the foreign observer, to whom much in Soviet law is closed, entitled to treat these pot-sherds as fairly representative of that which is not accessible? Would one be justified in supposing that *all* convictions in politically delicate cases are predetermined; that *all* notice and photographs and news items in the Soviet press are choreographed with minute attention to alphabetical detail; that *no* Soviet scholar can prepare a candid and principled statement for the attention of his colleagues without reckoning with the peril of censure, demotion, dismissal, or worse?

We have to bear in mind that some suspicion can be as naive as some credulity. For example, the mere fact that the Soviet Union does not publish statistics of crime does not automatically justify the inference that the figures are unfavorable to the Soviet "image"; likewise the mere aggravation of the penalties fixed in the statute or code for various categories of crime does not automatically justify the inference that the incidence of crime in those categories has been increasing. Yet a regime that lives by the gag and the horn must pay the price. Popular cynicism in the Soviet Union, which may be stronger than distrust of the Soviet

68. Paraphrase by the author.

69. Though he had been chairman of the department of criminal law at Leningrad University, he "lost his office and his position as editor-in-chief of the legal journal *Pravovedenie*, and for almost the rest of his life he was unable to publish his works or regularly engage in research and pedagogical functions." P. 172.

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Union among foreigners, may have reached the stage noted sadly by an official of the Polish government in the days before the upheavals of the summer of 1980: "Things have come to such a pass that the people don't believe even the *bad* news."

*Soviet Law and Soviet Reality* presents the fruit of many years' labor. It is due to the orchard, not to the gardener's cultivation, that he has harvested not plums but prunes.